Supreme Court, U.S.
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No. 03-

IN THE

Supreme Court of the United States

KEITH BYRON BARANSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Petitioner

**Counsel of Record*

QUESTIONS PRESENTED

1A) Whether, in light of this Court's recent decision in *Groh* v. *Ramirez*, 540 U.S. ___ (2004), Baranski's right to be secure against unreasonable search and seizure was violated where the warrant used to seize machineguns and accessories admitted as evidence at his criminal trial did not state with particularity the items to be seized, but stated only "See Attached Affidavit" and the affidavit was neither attached nor present at the scene of the search.

1B) Whether, in light of this Court's recent decision in *Groh*, the good faith exception to the exclusionary rule permitted the admission as evidence of machineguns and accessories at Baranski's criminal trial because the warrant used to seize the machineguns and accessories did not state with particularity the items to be seized, but stated only "See Attached Affidavit" and the affidavit was neither attached nor present at the scene of the search.

1C) Whether it was harmless error to admit in Baranski's criminal trial the machineguns and accessories seized pursuant to the warrant which did not state with particularity the items to be seized.

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The Opinion of the Court of Appeals is unpublished and is in the Appendix ("App.") at App. 2a. The Order of the Court of Appeals denying a Petition for Rehearing En Banc is at App. 1a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 23, 2003. The Court of Appeals denied a timely Petition for Rehearing En Banc on October 30, 2003. On January 21, 2003, Justice Thomas extended the time to file this petition until March 28, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISION

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . and particularly describing the . . . things to be seized.

U.S. Const., Amend. 4.

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

On July 3, 2002, Baranski was indicted in the United States District Court for the Eastern District of Missouri,[1] charging him and unindicted (in this criminal case) co-conspirators James Carmi and Jeffrey Knipp with a single count

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[1] The district court had jurisdiction pursuant to 28 U.S.C. § 3231.

of conspiracy, pursuant to 18 U.S.C. § 371:

> to obtain the right to import machineguns into the United States and to receive and possess machineguns which had been imported into the United States, by means of making and submitting false entries on applications, and other records required by Title 26, Chapter 53 to import machineguns into the United States, knowing such entries to be false . . . .

The indictment also contained a "Criminal Forfeiture" count, pursuant to 28 U.S.C. § 2461(c), requesting forfeiture of 372 machineguns and 12 crates of accessories which had been seized pursuant to a search warrant from a customs bonded warehouse in Kentucky where Baranski had stored the machineguns and accessories.

Baranski filed, *inter alia*, a motion to suppress evidence (the 372 machineguns and 12 crates of accessories), to prohibit display of the 372 seized machineguns, and to dismiss the forfeiture count. The motions were referred to a magistrate judge who recommended denying them; Baranski timely filed objections with the district court judge. The district court judge adopted the recommendations of the magistrate judge, except as to the motion to prohibit display of the 372 seized machineguns and permitted the Government to display "several machineguns in the courtroom and/or photographs of same."

Following a five (5) day jury trial on the conspiracy charge, during which the Government introduced fifteen (15) of

the machineguns as evidence and displayed them to the jury,[2] Baranski was found guilty of the one count of conspiracy. Baranski timely filed motions for acquittal and for a new trial, which the district court denied. Baranski was sentenced to 60 months, 3 years supervised release, and a $100 special assessment. The district court also entered a judgment of forfeiture as to the 372 machineguns and 12 crates of accessories.[3] A timely notice of appeal was filed on February 26, 2003.

The Court of Appeals for the Eighth Circuit affirmed the conviction and forfeiture by unpublished opinion of September 23, 2003. With respect to the motion to suppress, the court of appeals held:

> The warrant should not have been suppressed for lack of particularity. Although the warrant did not set out the property to be seized, the warrant referred to a sealed affidavit that described the weapons. *United States* v. *Cherna*, 184 F.3d 403, 412-14 (5th Cir. 1999) (holding good faith exception applies). Even if the weapons should have been suppressed, their admission at trial was harmless error because Baranski was charged with knowingly making

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[2] The fifteen (15) machineguns were introduced and admitted as evidence in the early afternoon of the third day of the trial and remained in front of the jury box for the remainder of the trial.

[3] Although all 372 machineguns and the 12 crates of accessories were not admitted as evidence at the jury phase of the trial, they were subsequently admitted as evidence for purposes of the forfeiture proceeding.

> false statements on machine gun importation applications, and the documents and trial testimony proved the Government's case.

App. 4a.[4]

As to the admission and display of the fifteen (15) machineguns during the jury trial phase, the court of appeals explained that the "size, number, and military qualities [of the machineguns] were circumstantial evidence of Baranksi's knowledge they were not being imported for sale to law enforcement." App. 4a.

By order of October 30, 2003, the court of appeals denied Petitioner's timely filed petition for rehearing *en banc*. App. 1a.

Statement of Facts

On August 31, 1999, Baranski was licensed by the Bureau of Alcohol, Tobacco & Firearms ("ATF") as a firearms importer; he subsequently paid the special occupational tax required to import machineguns. See 26 U.S.C. § 5801. With such a license and tax payment, Baranski could both import and conditionally import machineguns. A conditional importation is one where, if an import application is approved by ATF, the machineguns may be brought into a customs bonded warehouse

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[4] While the court of appeals stated only that "the warrant referred to a sealed affidavit that described the weapons," it was undisputed that the affidavit was not attached to the warrant nor was the affidavit present at the scene of the search. Indeed, following oral argument, because a question had arisen whether a copy of the affidavit was present at the search, Government counsel sent a letter to the court acknowledging that there was no evidence that the agents brought a copy of the affidavit to the search.

("CBW") for storage not to exceed five years; no law enforcement demonstration letter is required for a conditional importation.[5] To import machineguns from a CBW for transfer within the United States, another import application must be filed, with a law enforcement demonstration letter.

Baranski conditionally imported a number of machineguns and accessories into Pars International, a CBW in Kentucky. Baranski also imported forty-nine (49) machineguns which he took into his own possession.[6]

In about September, 1999, Baranski met James Carmi, who gave Baranski a copy of a federal firearms dealer license for Vic's Guns. Carmi identified himself as Dave Carmi and told Baranski that the license was valid because the license had been issued to Dave Carmi.[7]

Following the meeting, Carmi received:

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[5] A law enforcement demonstration letter is required to import machineguns. 27 CFR 479.105(d). Although referred to as a "law enforcement" demonstration letter, in fact a demonstration may be requested by any governmental agency, not only a law enforcement agency, including the military or the National Guard, and the agency need only have an interest in seeing a demonstration of a particular machinegun: it does not necessarily have to intend to buy the machinegun.

[6] The court of appeals misstated the record in stating that Baranski sold the 49 machineguns to co-conspirator James Carmi.

[7] Carmi "always told Baranski" that his name was "Dave" and "never told Mr. Baranski the truth about" his real name because Carmi was a convicted felon who could not possess firearms.

> a call from [Baranski] saying that he has a connection in Eastern Europe for different automatic weapons. And he was getting an importer's license and he wanted to start bringing them into the country, and would I be interested in buying them.

Carmi told Baranski that he would buy everything Baranski "could get out of the bonded warehouse" using law enforcement demonstration letters. Carmi did not testify that Baranski agreed to do so or had an understanding to do so.

On October 29, 1999, Baranski faxed Carmi a list of items he could obtain. Baranski asked Carmi if he could get him law enforcement demonstration letters. Carmi referred Baranski to Dave Auguston of August Arms in New Mexico who had a law enforcement demonstration letter from a Deputy Marshal at the Jemez Springs, New Mexico Police Department. Baranski later told Carmi that he had made "some arrangements" with Auguston to get a law enforcement demonstration letter.[8]

After Baranski made arrangements with Auguston, Baranski telephoned Carmi and told Carmi that he was upset because he had received a call from ATF – on March 24 or 25, 2000 – denying his import applications because ATF had contacted the Jemez Springs Police Department and was informed that the Department did not have any interest in the machineguns and the deputy who signed the letter was no

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[8] Baranski faxed Auguston a list of machineguns that he could obtain and Auguston faxed and mailed him the letter from the Jemez Springs Police Department.

longer an employee. Carmi told Baranski that he (Carmi) could get another letter. On March 27, 2000, Baranski faxed Carmi a list of firearms for which he needed a law enforcement demonstration letter.

Carmi contacted Knipp (Farber, Missouri Police Chief) whom he had met previously at his (Carmi's) farm when Knipp was searching for a licensed firearms dealer who could sell his department an H&K machinegun and he located Vic's. Knipp also knew Carmi as Dave Carmi. Carmi asked Knipp to prepare a law enforcement demonstration letter addressed to Baranski. When Knipp agreed to prepare the letter, Carmi faxed him Baranski's letter of March 27, 2000; Knipp mailed back a letter dated April 6, 2000 on Farber Police Department letterhead, which Carmi forwarded to Baranski.[9] The letter stated: "I would like to request a demonstration of the following firearms for evaluation by my department's tactical unit" and listed more than fifty (50) models of machineguns.[10]

Carmi received a fax from Knipp on July 10, 2000 addressed to "Dave" in which Knipp informed Carmi that he had been contacted by ATF about the letter and that ATF had informed him that the application was not going to be approved because it included such a large list of guns.

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[9] Baranski's applications using the Knipp letter of April 6, 2000 were disapproved by letter dated June 27, 2000 because "the firearms being requested do not coincide with the firearms requested by the chief of police" and by letter dated September 8, 2000 because Knipp's department was "no longer interested in a demonstration . . . ."

[10] The fifteen (15) machineguns admitted as evidence were among the models listed.

Carmi spoke to Baranski after receiving Knipp's fax and they "came up with a shortened list." On August 22, 2000, Knipp faxed Carmi a draft letter on Farber Police Department letterhead which included a list of nine (9) machinegun models. Knipp subsequently sent signed copies of the August 22, 2000 letter to Carmi, who sent it to Baranski. Baranski submitted the last import applications using the law enforcement letter prepared by Knipp on August 25 and 26, 2000.

On April 11, 2001, ATF agents executed a search warrant (issued by the United States District Court for the Western District of Kentucky) on Pars International, the CBW where Baranski had stored conditionally imported machineguns and accessories. The warrant had been issued based upon the Application and Affidavit For Search Warrant of ATF Special Agent Michael Johnson. After describing the premises of Pars International, the pre-printed warrant form stated: "there is now concealed a certain person or property, namely . . . ." In the blank space following that phrase, the warrant states: "See Attached Affidavit." The affidavit was not attached to the warrant nor was it present at the scene of the search.

At the part of the Application where the affiant identifies the person or property to be seized, the Application also stated only "See Attached Affidavit." Similarly, at the part of the Application where the affiant identifies the basis for the search and seizure under Rule 41(b) of the Federal Rules of Criminal Procedure, the Application again states only "See Attached Affidavit."

The Affidavit itself also does not identify any specific property to be seized, stating only that Agent Johnson has:

> probable cause to believe that a large number of law enforcement restricted machineguns were fraudulently imported into the United States with the intention of further being distributed and sold to others involved in the conspiracy. I also have probable cause to believe that the machineguns in question are currently being stored at the Pars International Custom's Bonded Warehouse, 509 Cheyenne Avenue, Louisville, Kentucky.

The agents seized 372 machineguns and 12 crates of accessories which were pointed out to the agents by the warehouse owner as belonging to Baranski. After receiving notice of forfeiture from ATF, Baranski timely filed a claim.

ARGUMENT

THE COURT OF APPEALS DECISION DIRECTLY CONFLICTS WITH THIS COURT'S RECENT DECISION IN *GROH* V. *RAMIREZ*

I. The Decision In *Groh*

In *Groh*, the Application for the warrant:

> stated that the search was for "any automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the

> purchase or manufacture of automatic weapons or explosive devices or launchers."

Slip Op. 2.

The Application was supported "with a detailed affidavit" that "set forth the basis for [the affiant's] belief that the listed items were concealed on the ranch." *Id.* The warrant, however, "failed to identify any of the items that petitioner intended to seize." *Id.* The warrant also "did not incorporate by reference the itemized list contained in the application." *Id.* And, as in the case at bar, the "affidavit was sealed." *Id.*, n.3.[11]

The Court held that the warrant "was plainly invalid." Slip Op. 5. The Court first stated:

> The Fourth Amendment states unambiguously that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing* the place to be searched, and *the persons or things to be seized.*" (Emphasis added [by Court]).

Id.

With regard to the particularity requirement, the Court concluded, "the warrant failed altogether." *Id.* Responding to

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[11] This Court noted that the "sufficiency [of the affidavit] is not disputed." *Id.*, n.3. In the case bar, the affidavit's sufficiency *was* disputed in the district court and in the court of appeals, although that issue is not being raised in the instant petition.

the contention that a sufficiently particular *application* could save a warrant, the Court held:

> The fact that the *application* adequately described the 'things to be seized' does not save the *warrant* from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.

Id.

The Court clarified that the Fourth Amendment does not "forbid[] a warrant from cross-referencing other documents." *Id.* But, the Court emphasized, the warrant must use "appropriate words of incorporation" *and* the supporting document must "accompan[y] the warrant." Slip Op. 6. As authority for this conclusion, the Court cited cases from six (6) courts of appeals. *Id.*

The Court further held that the search was unreasonable because the warrant:

> did not simply omit a few items from a list of many to be seized, or misdescribe a few of several items. Nor did it make what fairly could be characterized as a mere technical mistake or typographical error.

Id.

Accordingly, the warrant was "so obviously deficient

that we must regard the search as 'warrantless' within the meaning of our case law." *Id.* The Court next reiterated that the "presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant." Slip Op. 7.

The Court also squarely rejected the contention that a search pursuant to a warrant lacking particularity may not be unreasonable where the "scope of the search did not exceed the limits set forth in the application." Slip Op. 8. In rejecting this contention, the Court focused on the fact that, if the things to be seized are not described in the warrant, but in the affidavit, the affidavit must be "incorporated by reference" *and* be "present at the search . . . ." *Id.*[12]

The Court further held that the affiant did not have qualified immunity because the right that was transgressed was "clearly established." The primary basis for the Court's conclusion was that, because "the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid." Slip Op. 12. Further, the Court noted that "even a cursory reading of the warrant in this case – perhaps just a simple glance -- would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." Slip Op. 12-13. Finally, the Court applied the third circumstance established in *United States v.*

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[12] The Court's recognition that the particularity requirement is met where the affidavit is incorporated by reference and is present at the search assumes that the affidavit particularly describes the things to be seized.

Leon, 468 U. S. 897 (1984) under which the good faith exception to the exclusionary rule does not apply:

> a warrant may be so facially deficient--*i.e.*, in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid.

468 U. S. at 923.

II. Under *Groh*, The Warrant In The Case At Bar Was Invalid And The Seizure Was Unreasonable

The court of appeals in the case at bar held:

> The warrant should not have been suppressed for lack of particularity. Although the warrant did not set out the property to be seized, the warrant referred to a sealed affidavit that described the weapons. *United States* v. *Cherna*, 184 F.3d 403, 412-14 (5th Cir. 1999) (holding good faith exception applies).

App. 4a.

In *Groh*, however, this Court plainly and unmistakably rejected the contention that a warrant is constitutional merely because it refers to an affidavit. Rather, the warrant must not only use "appropriate words of incorporation," but the supporting document must "accompan[y] the warrant." Slip Op. 6. As stated in *United States* v. *McGrew*, 122 F.3d 847 (9th

Cir. 1997) (one of the cases approved in *Groh*, Slip Op. 6), "the warrant referred the reader to the 'attached affidavit which is incorporated herein.'" 122 F.3d at 848. There was, however, "no evidence that the affidavit or any copies were ever attached to the warrant or were present at the time of the search . . . ." 122 F.3d at 849. In the case at bar, the affidavit was not attached to the warrant nor was the affidavit present at the scene of the search.

In the instant case, moreover, unlike *Groh* (where the Application for the warrant set forth very specific items to be seized[13]), the Application for the warrant here also did not state with particularity the things to be seized; it also simply stated: "See Attached Affidavit."[14] Thus, the warrant in the case at bar was even more defective than that held invalid in *Groh* and the decision of the court of appeals directly conflicts with *Groh*.[15]

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[13] "[A]ny automatic firearms or parts to automatic weapons, destructive devices to include but not limited to grenades, grenade launchers, rocket launchers, and any and all receipts pertaining to the purchase or manufacture of automatic weapons or explosive devices or launchers." Slip Op. 2.

[14] Even the affidavit in the case at bar did not identify any specific property to be seized, stating only that Agent Johnson has:

> probable cause to believe that a large number of law enforcement restricted machineguns were fraudulently imported into the United States with the intention of further being distributed and sold to others involved in the conspiracy.

[15] The decision of the court of appeals also conflicts with the six (6) courts of appeals cases cited by this Court at Slip Op. 6.

III. *Groh* Mandates That The Good Faith Exception Does Not Apply To The Instant Case

The court of appeals relied on the good faith exception to the exclusionary rule to uphold the admission of the 15 machineguns at trial and the admission of all 372 machineguns and the 12 crates of accessories for purposes of the forfeiture proceeding. Under *Groh*, the good faith exception would not apply to the instant evidence.

While *Groh* was concerned with quality immunity, the Court derived the test for qualified immunity from the test for the good faith exception:

> Although both *Sheppard* and *Leon* involved the application of the "good faith" exception to the Fourth Amendment's general exclusionary rule, we have explained that "the same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer." *Malley v. Briggs*, 475 U. S. 335, 344 (1986) (citation omitted).

Slip Op. at 13, n.8.

Thus, the holding of *Groh* with respect to qualified immunity applies equally to the "good faith" exception to the exclusionary rule.

The primary basis for the Court's rejection of qualified

immunity was:

> Given that the particularity requirement is set forth in the text of the Constitution, no reasonable officer could believe that a warrant that plainly did not comply with that requirement was valid.

Slip Op. at 12.

Moreover, "even a cursory reading of the warrant in this case – perhaps just a simple glance -- would have revealed a glaring deficiency that any reasonable police officer would have known was constitutionally fatal." Slip Op. at 12-13. Further, the Court concluded:

> No reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless search of the home is presumptively unconstitutional. See *Payton*, 445 U. S., at 586-588. Indeed, as we noted nearly 20 years ago in *Sheppard:* 'The uniformly applied rule is that a search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional.' 468 U. S., at 988, n. 5.

Slip Op. at 13.

Finally, the Court made clear that its holding in *Leon* was a *per se* rule and retained its vitality:

> "[A] warrant may be so facially deficient--*i.e.*, in failing to particularize the place to be searched or the things to be seized--that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S., at 923.

Slip Op. at 13.

Two of the courts of appeals cases approved in *Groh* also recognized that the good faith exception should not apply in circumstances identical to the case at bar.

In *McGrew*, "the warrant referred the reader to the 'attached affidavit which is incorporated herein.'" 122 F.3d at 848. There was "no evidence that the affidavit or any copies were ever attached to the warrant or were present at the time of the search . . . ." 122 F.3d at 849. The Ninth Circuit held that the good faith exception to the exclusionary rule did not apply: "If the 'incorporated' affidavit does not accompany the warrant, agents cannot claim good faith reliance on the affidavit's contents." 122 F.3d at 850.

In *United States* v. *Williamson*, 1 F.3d 1134 (10th Cir. 1993), the court held that the warrant "did not describe the premises to be searched with sufficient particularity" and, as a result, "the government is not entitled to the 'good faith' exception to the exclusionary rule . . . ." 1 F.3d at 1136.[16]

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[16] In *United States* v. *Curry*, 911 F.2d 72 (8th Cir. 1990), the court concluded that the good faith exception applied, but only because the "Application for Search Warrant and Supporting Affidavit" was "attached to the warrant . . . ." 911 F.2d at 78.

Thus, as the warrant here failed to particularize the things to be seized, the holding of the court of appeals with respect to the good faith exception is directly contrary to *Groh* and the decisions of other circuits.[17]

IV. The Admission Of The Machineguns Was Not Harmless Error

The final basis for the decision of the court of appeals with respect to exclusion of the machineguns was:

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[17] The court of appeals decision also conflicts with the very case it cites: *United States* v. *Cherna*, 184 F.3d 403 (5th Cir. 1999). In *Cherna*, the defendant contended that the good faith exception to the exclusionary rule did not apply because the warrant was facially deficient in failing to particularize the things to be seized. While the affidavit in *Cherna* was under seal (as in the case at bar), it was (unlike the case at bar) "present in [the agent's] vehicle throughout the search . . . ." 184 F.3d at 406. Moreover, "Attachment B" (which was expressly referenced in the warrant and which described the evidence to be seized) was attached to the warrant. The Fifth Circuit thus held that the good faith exception applied:

> Nor is this a case in which the non-attachment of Smitherman's affidavit made the warrant so obviously defective that the officers could not reasonably have relied on it. First, Attachment B, *expressly mentioned in the warrant and attached thereto*, referred to Smitherman's affidavit and described in considerable detail twenty-six categories of evidence to be seized. A reasonable executing officer, relying on the magistrate judge's issuance of the warrant and sealing of the affidavit, could have believed that the reference to the affidavit and the rather lengthy list that followed satisfied the Fourth Amendment's particularity requirement.

184 F.3d at 412 (emphasis added).

> Even if the weapons should have been suppressed, their admission at trial was harmless error because Baranski was charged with knowingly making false statements on machine gun importation applications, and the documents and trial testimony proved the Government's case.

App. 4a.[18]

Further, the court of appeals stated that "Baranski does not assert how admission of the weapons prejudiced him." *Id.*

The court of appeals decision was contrary to this Court's established federal constitutional harmless error jurisprudence.

In *Chapman* v. *California*, 386 U.S. 18 (1967), the Court held that, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." 386 U.S. at 24. *Chapman*'s federal constitutional harmless error analysis applies to Fourth Amendment violations. *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment). Moreover, the harmless error standard of *Chapman* "requires the State to prove that the defendant was not prejudiced by the error." *Kimmelman v.*

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[18] If the 15 machineguns were not admissible in the jury trial phase, all 372 machineguns and the 12 crates of accessories were not admissible in the forfeiture proceeding as the exclusionary applies to forfeiture proceedings. See *Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965).

Morrison, 477 U.S. 365, 382, n.7 (1986).[19] In addition, *Fahy v. Connecticut*, 375 U.S. 85 (1963) (upon which *Chapman* was based) held:

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

375 U.S. at 86-87.

The decision of the court of appeals in the case at bar is contrary to *Chapman*, *Kimmelman*, and *Fahy*.

A) The court of appeals did not evince a belief that the error was harmless *beyond a reasonable doubt*. In fact, a review of the record would not have permitted the court of appeals to have come to the belief that the admission of the machineguns was harmless beyond a reasonable doubt.

First, the items admitted at trial were machineguns (which the prosecutor repeatedly referred to as military weapons). In *Bumper* v. *North Carolina*, 391 U.S. 543, 550 (1968), the Court concluded that a .22 rifle was "plainly

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[19] *Chapman* itself had noted that "constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." 386 U.S. at 24.

damaging evidence against the petitioner" and "its admission at the trial was not harmless error." As the Court provided no analysis of the record, it is evident that the Court viewed the wrongful admission of a firearm as *per se* harmful.[20] If a single .22 rifle can be assumed to be "plainly damaging evidence" and "its admission at the trial was not harmless error," the admission of 15 machineguns (which the prosecutor emphasized were military weapons) must also not be harmless error.

Second, to determine whether the error was harmless, *Chapman* looked to "the state prosecutor's argument . . . ." 386 U.S. at 25. In the case at bar, the heart of the Government's case was its contention that Baranski conspired to make false entries on import applications, i.e., that the machineguns were for sale to law enforcement when, in fact, they were not, *knowing* such entries to be false. To prove Baranski's knowledge that the machineguns were not for sale to law enforcement, the Government contended (in the words of the court of appeals) that the "size, number, and military qualities [of the machineguns] were circumstantial evidence of Baranksi's knowledge they were not being imported for sale to law enforcement." App. 4a. To ensure that the jury was aware of the size and military qualities of the machineguns, as each

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[20] The Ninth Circuit has noted: "Rightly or wrongly, many people view weapons, especially guns, with fear and distrust. Like evidence of homosexuality (citations omitted), photographs of guns often have a visceral impact that far exceed their probative value. (citations omitted). The prejudice is even greater when the picture is not of one gun but of many." *United States* v. *Hitt*, 981 F.2d 422, 424 (9th Cir. 1992). What is true of photographs is even more so with the actual firearms, particularly where the firearms are machineguns that the Government argued were for military use.

machinegun was introduced and identified, the prosecutor paraded it in front of the jury and then placed it on the floor in front of the jury box where it remained throughout the trial.

The prosecutor's focus on the nature of the machineguns was evident from his direct examination of the ATF agent: The prosecutor asked Agent Johnson: "Now, Agent Johnson, I know you're stronger than I am, but these bigger weapons are getting heavier, aren't they?" Johnson was also asked regarding another machinegun: "And this one even has a handle on it?" Johnson answered "Yes" and was then asked: "Because of its weight?" to which Johnson answered "Yes." Further, during the cross examination of Baranski, the prosecutor asked Baranski about the machineguns.

Third, unlike *Chapman*, where there was "a reasonably strong 'circumstantial web of evidence' against petitioners" (386 U.S. at 25), the district court here noted that this case was "very, very close." Yet in *Chapman*, the Court still concluded that the case was one "in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts." 386 U.S. at 26. The same is even more true here.

B) The court of appeals imposed on Baranski the burden of showing that he *was* prejudiced. It is, however, the burden of the Government to show that Baranski was *not* prejudiced.

C) The court of appeals reached its conclusion based upon its finding that there was sufficient evidence on which Baranski could have been convicted without the machineguns. This conclusion is contrary to *Fahy* since a reviewing court is

not to be "concerned . . . with whether there was sufficient evidence" on which Baranski "could have been convicted without" the machineguns; rather, the court of appeals should have determined "whether there is a reasonable possibility" that the machineguns "might have contributed to the conviction." 375 U.S. at 86-87.

The Court should thus, at a minimum, "vacate the judgment insofar as it rested on harmless error and remand for further proceedings." *Clemons v. Mississippi*, 494 U.S. 738, 754 (1990).

CONCLUSION

Because the court of appeals decision is directly contrary to this Court's later decision in *Groh*, the Court should grant this petition, vacate the judgment of the court of appeals, and remand the case for reconsideration in light of *Groh*.

RICHARD E. GARDINER*
Suite 404
10560 Main Street
Fairfax, Virginia 22030
(703) 352-7276

Counsel for Petitioner

*Counsel of Record

March, 2004

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-1575

United States of America,	*	
	*	
Appellee,	*	Order Denying Petition for
	*	Rehearing and for Rehearing
vs.	*	En Banc
	*	
Keith Byron Baranski,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

October 30, 2003

Order Entered at the Direction of the Court:

s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-1575

United States of America,	*	
	*	
Appellee,	*	Appeal from the United
	*	States District Court
v.	*	for the Eastern District
	*	of Missouri
Keith Byron Baranski,	*	[UNPUBLISHED]
	*	
Appellant.	*	

Submitted: September 11, 2003

Filed: September 23, 2003

Before MELLOY, RICHARD S. ARNOLD, and FAGG, Circuit Judges.

PER CURIAM..

Keith Byron Baranski, a federally licensed firearms dealer, imported more than 400 machine guns from Eastern

Europe. To remove the firearms from the customs warehouse, however, Baranski needed letters from law enforcement departments requesting demonstrations of the weapons or indicating a desire to purchase them. Baranski teamed up with a felon named Carmi who provided fictitious police department letters. Using the bogus letters, Baranski removed nearly fifty of the guns from the customs warehouse and sold them to Carmi. The scheme unraveled when the Bureau of Alcohol, Tobacco & Firearms (ATF) checked one of the letters.

The Government charged Baranski with conspiracy to import machine guns illegally by submitting false entries in forms submitted to the ATF. See 18 U.S.C. § 371. At trial, the evidence against Baranksi included the allegedly false documents submitted to the ATF, the testimony of two co-conspirators, letters and faxes sent by Baranski, and the testimony of an ATF agent to whom Baranski had admitted submitting false documents. A jury convicted Baranski, and the district court[1] sentenced him to sixty months in prison. The Government sought and obtained criminal forfeiture of the weapons. See 26 U.S.C. § 5861(1).

On appeal, Baranski raises several issues. First, Baranski challenges the denial of his motion to suppress results of a search warrant. The district court properly denied the motion to suppress. Baranski was not entitled to a hearing under Franks v. Delaware, 438 U.S. 154 (1978), because there was probable cause for issuance of the warrant regardless of the

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[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

alleged errors. United States v. Briscoe, 317 F.3d 906, 907 (8th Cir. 2003). The warrant should not have been suppressed for lack of particularity. Although the warrant did not set out the property to be seized, the warrant referred to a sealed affidavit that described the weapons. United Sates v. Cherna, 184 F.3d 403, 412-14 (5th Cir. 1999) (holding good faith exception applies). Even if the weapons should have been suppressed, their admission at trial was harmless error because Baranski was charged with knowingly making false statements on machine gun importation applications, and the documents and trial testimony proved the Government's case. Further, the district court did not clearly abuse its discretion in admitting the fifteen machine guns into evidence at trial. Their size, number, and military qualities were circumstantial evidence of Baranksi's knowledge they were not being imported for sale to law enforcement. Baranski does not assert how admission of the weapons prejudiced him.

Baranksi also challenges the sufficiency of the evidence to convict him. Viewing the evidence in the light most favorable to the verdict, we conclude a reasonable jury could have found Baranski guilty beyond a reasonable doubt. United States v. Yockel, 320 F.3d 818, 824 (8th Cir. 2003). The evidence showed Baranksi made false statements on ATF applications, knew the police letters were fraudulent, planned to sell the weapons to Carmi whom Baranski knew could not legally buy them, and joined the conspiracy admitted by Carmi.

Next, Baranski asserts the district court should have granted a new trial because of alleged prosecutorial misconduct, specifically, allegedly improper cross-examination and closing argument during trial. Having carefully reviewed the record, we

conclude the alleged misconduct did not substantially prejudice Baranski. Darden v. Wainwright, 477 U.S. 168, 181 (1986) (to warrant reversal, prosecutorial misconduct must so infect the trial with unfairness that the defendant's conviction is a denial of due process).

Last, Baranksi challenges the criminal forfeiture of weapons and accessories. The indictment included a notice of forfeiture of 372 machine guns and twelve crates of accessories for them under 26 U.S.C. §§ 5872 and 7302, 28 U.S.C. § 2461(c), and 21 U.S.C. § 853. We conclude forfeiture was authorized under 28 U.S.C. § 2461(c), which provides:

> If a forfeiture of property is authorized in connection with a violation of an Act of Congress, and any person is charged in an indictment . . . with such violation but no specific statutory provision is made for criminal forfeiture upon conviction, the Government may include the forfeiture in the indictment . . . and upon conviction, the court shall order the forfeiture of property . . . .

Although Baranski was convicted of a conspiracy under 18 U.S.C. § 371, the indictment alleged Baranski committed the conspiracy by making and submitting false entries on applications in violation of 26 U.S.C. § 5861(1). Forfeiture of the firearms involved in any violation of 26 U.S.C. § 5861(1) is authorized by 26 U.S.C. 5872. Thus, the forfeiture was legally permissible. Further, the evidence was sufficient to support the forfeiture order. The district court only had to find the weapons were intended to be used to commit or facilitate commission of

the charged crime. 21 U.S.C. § 853(a)(2). Carmi's testimony supported the finding that Baranski intended to sell the seized guns to Carmi.

Having considered and rejected all the issues raised by Baranski, we affirm the district court.